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No. 01-618

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT, in His Official Capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, AMBERSON HOLDINGS LLC, RICHARD AVEDON, THE GEORGE BALANCHINE TRUST, PETER BARTOK, BOOSEY & HAWKES, INC., THE AARON COPLAND FUND FOR MUSIC, INC., EUROPEAN-AMERICAN MUSIC CORPORATION, THE GEORGE GERSHWIN FAMILY TRUST, THE LEONORE S. GERSHWIN TRUST FOR THE BENEFIT OF THE IRA AND LEONORE GERSHWIN PHILANTHROPIC FUND, THE LEONORE S. GERSHWIN TRUST FOR THE BENEFIT OF THE LIBRARY OF CONGRESS, THE KEITH HARING FOUNDATION, THE FREDERICK LOEWE FOUNDATION, INC., DAVID MAMET, GLEN ROVEN, AND THE KURT WEILL FOUNDATION FOR MUSIC IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

This brief supporting Respondent is submitted in opposition to the misplaced efforts of Petitioners and their *amici* to obtain from the Court what they could not obtain from Congress. Consents to this filing are lodged with the Clerk.

Amici are the nation's trade associations of book publishers, the Association of American Publishers ("AAP"), and the composers, artists, and playwrights (or their heirs) of some of the most celebrated and prized works of 20th Century culture, who are identified more fully in the Addendum below. They all depend on the rights secured by copyright law to engage, in their various ways, in the creation and/or dissemination of copyrighted works, to the larger public benefit.[1]

Not all *amici* supported the enactment of the Copyright Term Extension Act ("CTEA"). AAP, for example, took no position due to the different positions that its members, the nation's leading publishers, had on the legislation, some supporting and some opposing, depending on the nature of their businesses. But all *amici* believe it important that Congress be allowed to weigh the competing concerns and make the policy judgments that the Copyright power authorizes, and that Petitioners' effort to have the courts displace the congressional judgment will in the long run be destructive of the Constitutional plan and congressional exercise of its powers. Congress, not the Courts, is entrusted with that responsibility and armed with the ability to balance interests and make fine distinctions that is the essence of the legislative, not the judicial, process.

When Petitioners and their *amici* first articulated to Congress the arguments now made again here, Congress considered them and altered the legislation accordingly. One result of that process is 17 U.S.C. § 108(h), which responded

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[1] No counsel for a party in this Court authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of the brief. *Amici* are identified in an addendum attached hereto.

to concerns of some libraries – which continue to challenge the CTEA even though their concerns were addressed – by providing for use of works during the entire extension period after reasonable investigation.

Amici fully support the importance of close First Amendment review when First Amendment rights are threatened. But neither the CTEA nor copyright law generally threatens those rights. Generally supportive of the holding of the D.C. Circuit and the argument of the Solicitor General as to the power of Congress to have enacted the CTEA, we focus here on Petitioners' First Amendment argument, showing that it is inconsistent with the traditional understanding of the reconciliation of copyright and free speech doctrines and with the history underlying the Copyright Clause and early copyright jurisprudence in both Great Britain and the United States, and on the threat that Petitioners' arguments pose to prior extensions and corresponding reliance interests.

SUMMARY OF ARGUMENT

Petitioners' argument that the CTEA violates the First Amendment ignores the First Amendment safeguards already internalized in copyright law, and fails to explain why internal protection previously considered adequate to protect First Amendment rights is now insufficient. There is no authority in this Court for subjecting copyright statutes to free-standing First Amendment review, much less to intermediate scrutiny, and considerable precedent arguing against the intermediate review Petitioners seek to import. First Amendment freedoms are essential, but the accommodation between copyright law and the First Amendment is already in place, internal to copyright law, and, at least for traditional copyright statutes like the CTEA, an additional layer of First Amendment intermediate scrutiny is both unnecessary and unworkable.

Nor is history on Petitioners' side. The Framers perceived no conflict between the Copyright Clause and the First Amendment, nor did they consider extending copyrights in existing works unconstitutional. Petitioners further

misrepresent the grounds of the Framers' concern with "monopolies," which was more the product of fears of favoritism than the result of a desire to limit exclusive rights.

Petitioners offer no principled distinction between the CTEA and previous congressional extensions of the term or scope of copyright, and to accept their attack on the CTEA would place the prior extensions in doubt and unsettle countless investments and transactions entered in reliance on prior extensions.

ARGUMENT

I. THE CTEA DOES NOT VIOLATE THE FIRST AMENDMENT

A. Copyright Itself Is The Engine Of Free Expression And Provides The Necessary Breathing Room For Free Speech.

Petitioners' argument rests on the erroneous premise that copyright suppresses free speech.

The primary concern of the First Amendment is the free flow of *ideas*.[2] But "[c]opyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed."[3]

This so-called "idea-expression dichotomy" – the rule that copyright does not restrain the exchange of an author's ideas, but merely prevents others from purloining an author's particular *expression* of those ideas – "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556. The idea-expression dichotomy nurtures and protects

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[2] *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (rationalizing freedom of speech as a means of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail").

[3] *Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 556 (1985), citing Justice Brennan's concurrence in *New York Times Co. v. United States*, 403 U.S. 713, 726 n. * (1971); *see also* 17 U.S.C. § 102(b); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

the "marketplace of ideas." On the one hand, the dichotomy allows others to make use of, build upon and disseminate ideas that have already been conceived; ideas are free for all to use, and completely outside copyright protection. "The marketplace of ideas would be utterly bereft, and the democratic dialogue largely stifled, if the only ideas which might be discussed were those original with the speakers."[4] On the other hand, the dichotomy also serves to foster the creation and dissemination of new ideas, by securing income streams to creators for their particular expressions for limited periods. "It should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[5]

The free flow of ideas is vital to our democratic society for three reasons. It educates and informs (the "enlightenment function").[6] It acts as "a safety valve against violent acts."[7] And it serves as a means of "self-fulfillment," or "an end in itself."[8] Granting a monopoly, let alone a monopoly for limited times, on the particular expression of an idea does no harm to any of these purposes.

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4 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH ["SMOLLA"] § 21:5, at 21-8.2 (1996) (citing *Lee v. Runge*, 404 U.S. 887, 893 (Douglas J., dissenting)) ("The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained.").

5 *Harper & Row*, 471 U.S. at 558.

6 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT [hereinafter "NIMMER"] § 1.10[1] (2002) (citing, *inter alia, Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring)).

7 *Id. See also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression* [hereinafter, "Denicola"], 67 CAL. L. REV. 283, 286 (1979) (free speech "can act as a stabilizing force in society in that it channels potentially disruptive energy into a more useful public dialogue. . . .") (also citing Brandeis' concurrence in *Whitney*).

8 NIMMER, *supra*, § 1.10[1]; Denicola, *supra*, at 286.

Any argument that extending copyright terms for expression (not ideas) frustrates either the "safety valve" or the "self-fulfillment" purpose of free speech can be quickly rejected. "It is not likely that men will resort to violence because they lack the legal right to reproduce the expression of another"[9] and "[o]ne who pirates the expression of another is not thereby engaging in *self*-expression in any meaningful sense."[10] As Professor Jane Ginsburg has written:

> [Petitioners'] would like to avoid the rational basis test, to put the [term] extension to a higher standard. . . . [Petitioners' argument is that the] term extension has a deleterious impact on speech; and once one pronounces the word 'speech,' a higher level of scrutiny attaches. But where is the 'speech' at issue here? What Eric Eldred proposes to do is recirculate *other people's* speech. The First Amendment is certainly about the freedom to make your *own* speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt.[11]

The most vital of the three functions – the "enlightenment function" – is also not harmed by the grant of a limited copyright monopoly, regardless of the term of years. "It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."[12] Professors Smolla and Nimmer offer this example:

> It is important that we have free access to the ideas of both William F. Buckley and John K. Galbraith; and everyone should have the right

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9 SMOLLA, *supra*, § 21:5, at 21-11.

10 *Id.*

11 Jane C. Ginsburg, et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 701 (2000) (emphasis added).

12 SMOLLA, *supra*, § 21:5, at 21-10.

> to disseminate Buckley's and Galbraith's ideas, either by way of endorsement or criticism. That process of enlightenment, however, does not require the freedom to reproduce without permission either Buckley's book *Up From Liberalism* or Galbraith's *The Affluent Society*. To reproduce the 'expression' of their ideas may add flavor but relatively little substance to the data that must inform the electorate in the decision-making process. Such minimal substance, lost through the copyright prohibition on reproduction of expression, is far outbalanced by the public benefit that accrues through copyright encouragement of creativity."[13]

Courts have consistently protected copyrighted expression from challenges that cite a First Amendment "need" or "right" to use such expression. The most famous of these is *Harper & Row*, where the Court rejected The Nation's argument that it had a First Amendment right to copy the expression of former President Ford contained in his then unpublished memoirs. Responding to the claim that Ford's expression was "essential to reporting the news story," the Court held:

> Copyright assures to those who write and publish factual narratives . . . that they may at least enjoy the right to market the original *expression* contained therein as just compensation for their investment. . . . In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create

[13] *Id.* § 21:5, at 21-10 – 21-11.

> what amounts to a public figure exception to copyright.[14]

The Court's rejection of the First Amendment challenge in *Harper & Row* mirrored and relied on its approach eight years earlier in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).[15] Zacchini had brought a damages action against a television broadcasting company that videotaped and broadcast his "human cannonball" act in its entirety, without consent. The Court held that a damage award for infringement of Zacchini's property interest in the publicity value of his performance did not violate the broadcaster's First Amendment rights, because protecting that property interest would not seriously curtail public access to or discussion of Zacchini's performance. Indeed, the Court noted that protecting his interest would encourage Zacchini to continue to perform the act, and thereby serve the public interest.[16] Finding satisfactory "the internal limits of the right of publicity"[17] and observing that granting Zacchini a monopoly on the performance (in the form of a right of publicity) would not prevent the defendant from reporting the facts surrounding Zacchini's act, the Court rejected the First Amendment defense.[18]

Dispositively, although First Amendment claims were raised in both *Zacchini* and *Harper & Row*, the Court applied "intermediate scrutiny" in neither, but rather rejected the First Amendment challenges on a categorical basis after concluding that neither infringement claims nor right of publicity claims threaten the traffic in *ideas*.

[14] 471 U.S. at 556-60 (emphasis added).

[15] *See* 471 U.S. at 557, citing 433 U.S. at 575.

[16] 433 U.S. at 573. Thus, the Court viewed the property interest in the act, like a copyright interest, as an engine of free expression. *See id.* ("[T]he State's interest [in recognizing a right of publicity] is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors. . . .").

[17] Denicola, *supra*, at 288.

[18] 433 U.S. at 574.

In sum, the idea-expression dichotomy, in copyright and related cases, appropriately accommodates free speech concerns.[19] And for any cases where "the values inherent in the rights of free speech and free press demand more than access to abstract ideas" and require "the use of the particular form of expression contained in a copyrighted work,"[20] copyright law, constructed to avoid any collision with the First Amendment, offers additional internal protections to protect free speech without the application of intermediate scrutiny.

First, under the "substantial similarity test," a speaker's use of a minimal amount of expression will generally not be actionable absent "substantial similarity" between the new work and the original work.

Second, where the information sought to be communicated and the mode of its expression are so intertwined that the one cannot be conveyed without the other, the expression is considered "merged" with the uncopyrightable idea.[21]

Third, and most importantly, the fair use doctrine also guarantees "breathing space *within the confines of* copyright [law]." *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (emphasis added). As *Harper & Row* recognized, the doctrine of fair use serves as an additional, broadly applicable

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[19] Other courts have reached the same conclusion. *See, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir.) ("To deny a biographer . . . the opportunity to copy the expressive content of unpublished letters is not . . . to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported."), *cert. denied*, 484 U.S. 890 (1987); *New Era Publ'ns, Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("An author's expression of an idea, as distinguished from the idea itself, is not considered subject to the public's 'right to know.'"), *cert. denied*, 493 U.S. 1094 (1990); *Sid & Marty Krofft Tel. Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (same); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) (same).

[20] Denicola, *supra*, at 293.

[21] *See e.g., Baker v. Selden*, 101 U.S. 99 (1879); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

safeguard against any interference of copyright law with constitutionally protected speech.[22] The doctrine of fair use, codified in Section 107 of the Copyright Act, "tempers the protection of copyright by allowing an author to use a limited amount of copyrighted material"[23] when copyright law might otherwise "stifle the very creativity which that law is designed to foster."[24]

Petitioners' attempts to distinguish *Harper & Row* and its progeny rely on wishful thinking, not persuasive analysis. If, as Petitioners all but concede, *Harper & Row* establishes "a presumption against the need to engage in a First Amendment analysis every time a copyright owner seeks to enforce his copyright against an infringer," then that same presumption should apply when the challenge is to the CTEA on its face (rather than to the 1976 Act "as applied"). Petitioners offer no principled reason why intermediate scrutiny is unnecessary for as-applied challenges (as this Court and every Circuit court that has addressed the issue has held), but necessary for facial challenges.

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[22] *Harper & Row*, 471 U.S. at 560 ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright."). Circuit court rulings are in accord. *See, e.g., Roy Exp. Co. Establishment v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1099 (2d Cir.) ("[n]o Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine"), *cert. denied*, 459 U.S. 826 (1982); *New Era Publ'ns, Int'l*, 873 F.2d at 584 ("the fair use doctrine encompasses all claims of first amendment in the copyright field"); *A& M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("First Amendment concerns in copyright are allayed by the presence of the fair use doctrine.").

[23] *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366, 1373 (2d Cir. 1993).

[24] *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

B. Intermediate Review Is Not Applicable Because Copyright Is A Law Of General Application That Does Not Restrict The Transmission Of Ideas.

Because copyright law *internally* provides the necessary breathing room for free speech, *see Harper & Row* and *Campbell*, "the present reach of the copyright law is such that its full scope should be 'defined' as outside the First Amendment sphere."[25] That is the approach the Court has taken, as *Harper & Row* and *Zacchini* reflect. And because facial challenges to statutes ordinarily draw no different standard of First Amendment review from "as-applied" challenges, the refusal to apply intermediate scrutiny in those cases should be controlling.

The Court's refusal to apply intermediate scrutiny in *Harper & Row* and *Zacchini* flowed directly from its view of copyright law as "the engine of free expression" rather than its enemy, and was consistent as well with various other lines of cases in which intermediate (or stricter) scrutiny has not been, but under Petitioners' theory should have been, applied.

"Intermediate" and "strict" scrutiny are not all-purpose tests applicable to every claim that a statute has, either intentionally, predictably or incidentally infringed First Amendment rights. Sui generis approaches (rather than "strict" or "intermediate" scrutiny) have been applied, not only in copyright and right of publicity cases such as *Harper & Row* and *Zacchini*, but also in funding cases,[26] defamation cases,[27] and cases involving the competing rights of cable access programmers and cable operators.[28] Members of the Court have frequently observed that different tools are

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[25] SMOLLA, *supra*, at 21-5.

[26] *South Dakota v. Dole*, 483 U.S. 203,207-210 (1987); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Legal Servs. Corp. v. Velazquez*,, 531 U.S. 533 (2001).

[27] *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[28] *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 739-42 (1996).

required in cases where competing First Amendment interests are at stake.[29] The considerations that underlay the formulation of situation-specific tools, sensitive to the competing interests in all those situations, in lieu of the residual "strict" and "intermediate" scrutiny tools applied elsewhere, support the categorical approach adopted in *Harper & Row*.

Rejection of Petitioners' invitation to apply intermediate scrutiny is supported as well by the Court's refusal to apply such scrutiny to regulations that govern non-expressive *conduct* and do not impose meaningful burdens on speech. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Copyright statutes, like the state promissory estoppel doctrine at issue in *Cohen* or the public lewdness law applied in *Arcara*, are generally applicable laws that do not target or single out the press and/or speech itself and apply to myriad "daily transactions" of Americans generally. *Cohen*, 501 U.S. at 670. Indeed, in refusing to apply intermediate scrutiny, *Cohen* reasoned that the "press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws," and concluded that "enforcement of such general laws . . . is not subject to stricter scrutiny." 501 U.S. at 669-70.

We all are subject to copyright laws; we all have a duty not to infringe established intellectual property rights through such unlawful conduct as copying, misappropriation, public displays, and the production of derivative works. So long as these laws are not used to punish or prevent the expression of ideas or opinions, only rationality review need be applied.

Petitioners ask this Court to apply the heightened level of intermediate scrutiny of *Turner Broadcasting System, Inc. v. FCC*.[30] However, the reasons for applying intermediate scrutiny in that case ("*Turner I*") do not exist in the copyright context. The CTEA does not, as the 1992 Cable Act did, require some speakers to carry the message of others

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[29] *Id.* at 743-44 (Breyer, J., concurring).

[30] 512 U.S. 622 (1994) ("*Turner I*").

(broadcast stations) at the expense of still others (cable programmers), thereby "impos[ing] special obligations upon cable operators and special burdens upon cable programmers."[31] Neither the CTEA nor copyright law generally "single[s] out the press, or certain elements thereof [cable programmers] for special treatment," thus "pos[ing] a particular danger of abuse by the State."[32]

Copyright stimulates the creation of new, original speech; whether for a term of one year or ninety years, it does not even arguably require some speakers to carry the message of others. Unlike FCC regulations which apply to discrete and identifiable parties like cable-network stations, copyright is a generally applicable law reaching everyone who copies. Whether for a term of life plus fifty years or life plus seventy, copyright imposes no special burdens or obligations on the press or on anyone else. The press, along with every other institution and every individual, is equally free to use the ideas embodied in a copyrighted work of authorship, and equally constrained to refrain from appropriating protected expression during the term Congress has set. If a term of fifty years does not offend the First Amendment, it is hard to see why the CTEA's terms do.

C. Intermediate Scrutiny Would Be Entirely Unworkable In The Copyright Sphere.

Intermediate scrutiny of the sort applied in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), is inconsistent with the analysis in *Harper & Row*, and far too blunt a tool to be workable as applied to the CTEA or to copyright law generally; indeed, if rigorously applied, numerous provisions of copyright law might be found wanting. The point is not that copyright law is violative of the First Amendment – it surely is not – but that the test Petitioners would have the courts apply leads to such absurd results as to confirm that it must be rejected.

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31 *Id.* at 641.

32 *Id.* at 640.

First, the very premise underlying *Harper & Row* was that copyright law burdens only the copying of expression and not the communication of ideas or free speech. But intermediate scrutiny of the sort required by *Turner I* is called for only if the statute challenged does burden speech.[33] The invitation to apply *Turner I* is at war with *Harper & Row*.

Second, it is hard to see how *Turner* analysis can be applied in a principled, predictable way that would not lead to the invalidation (at least by lower courts) of numerous provisions of copyright law. In *Turner II*, it was easy for the Court to articulate the relevant interests on both sides and to evaluate Congressional findings based on statistics, audience behavior, economic principles and broadcast history. However, copyright terms like "progress of science and the useful arts" and "limited times" resist meaningful *Turner* review.

Evaluating more or less restrictive means would be judicially unmanageable. Congress has for centuries applied copyright to *all* writings; how would a court assess whether that scope of coverage "burdens substantially more speech than is necessary" to further "the progress of science and the useful arts"? Or whether any challenged provision of copyright law (whether durational terms like the CTEA, extensions of copyright like the Digital Performance Right in Sound Recordings Act of 1995, or the extension of copyright to photographs "burdens substantially more speech than necessary to further" Congress's legitimate objectives? Must Congress have compiled a record with "evidence" supporting those judgments, and myriad others, for courts to pass on, even though neither the first Congress nor later Congresses enacting extensions did so?

Copyright law is built on Congress's understanding of both economic principles and the psychology of innovation, and has rested since the Statute of Anne on legislative judgments regarding incentives and public needs. To subject those legislative determinations to the inquiries reflected in

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33 *See* Point I.B., *infra* at 10-12.

Turner II would work a revolution in the ways that Congress approaches copyright revision, and unreasonably interfere with the legislature's exercise of its Article I, § 8 power.

Unlike cable television in the 1990s (still a relatively novel form of communication), copyright laws have existed in relatively the same basic form since the 1790s, and substantial reliance interests have arisen (discussed more fully in Point III below). Although cable television's youth permitted judicial fine-tuning without much fear of destabilization, introducing intermediate scrutiny to copyright now would threaten the entire system, unsettle established expectations, and risk creating substantial economic instability.

As in cases involving Congress's enumerated Article I powers generally, the Court should uphold copyright laws so long as the limitations of Article I are respected, Congress is pursuing a legitimate governmental objective, and the means chosen are rationally related to that objective. The Framers crafted the "limited times" provision in the Copyright Clause to give future Congresses appropriate authority in meeting the experiential demands of passing generations. So long as Congress does not pass laws prohibited under its enumerated powers, for the Court "to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[34] Simply stated, "limited times" is a question of degree. Applying rationality review would categorically rule out perpetual copyrights and would rationally rule out thousand year terms, but leave Congress with the necessary flexibility to make the necessary assessments, through the political process, concerning demographics, international markets and artistic capital. [35]

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[34] *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

[35] *See Pennock & Sellers v. Dialogue*, 27 U.S. 1 (1829) (duration is subject to the discretion of Congress, although Congress may not, under Article I, Section 8, confer intellectual property rights of unlimited duration).

II. History Does Not Support Petitioners' Argument That Copyright Term Extension Is Unconstitutional Or Warrants Close Review Under The First Amendment

A. The Framers Perceived No Tension Between The Copyright Clause And The First Amendment.

The Framers perceived no conflict between the Copyright Clause and the First Amendment. The Copyright Clause was not controversial; it was one of few clauses that the Constitutional Convention adopted without debate.[36] Two years later, when James Madison introduced the Speech Clause of the First Amendment in the House of Representatives, no member of Congress argued that the First Amendment was in tension with the Copyright Clause's protections of intellectual property.[37] The Framers entrenched the people's "right to speak, to write, [and] to publish their sentiments," but did not conceive of free speech as impinging upon proprietary or other rights (or vice versa).[38] Madison himself, as a member of the first Congress, voted for the Copyright Act.

Nor did any conflict between the two clauses manifest itself for many years after the adoption of the First Amendment. For example, nowhere in his landmark 1833 *Commentaries on the Constitution of the United States* did Justice Joseph Story perceive any incompatibility between copyright and free speech. Copyright's role in preventing "depredation and piracy" fell neatly outside the recognized limits to speech rights in the First Amendment: "[T]he language of this amendment imports no more, than that every man shall have a right to *speak, write, and print his opinions* upon any subject whatsoever, without any prior restraint, so always, that he does *not injure* any other persons in his rights,

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[36] 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 510-11 (J. Elliot ed. 1859).

[37] *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 44 (Boston, Hilliard, Gray & Co. 1833).

[38] 1 ANNALS OF CONG. 451 (1789) (proposal by Madison).

person, *property*, or reputation."[39] While "every freeman has an undoubted right to lay what sentiments he pleases before the public," Story observed, he must, "if he publishes what is improper, mischievous, or illegal," accept "the consequences of his own temerity."[40]

B. The Framers Did Not Consider Extensions Of Copyrights To Existing Works To Be Unconstitutional.

The history of copyright in the early years of the Republic also confirms that the Framers did not doubt the constitutionality of extending copyrights in existing works. Indeed, Congress made such "retroactive" extensions of intellectual property rights thirteen times in its first sixty-three years, including in the Copyright Act passed by the First Congress in 1790.

Extensions of copyright to existing works were a regular feature of copyright legislation throughout the eighteenth century. The Statute of Anne, which, like the Copyright Clause, declared its purpose to be for "the encouragement of learning," extended copyright protection of twenty-one years from the date of publication to works published prior to its enactment, while subsequently published works received copyright terms of fourteen years, plus an additional fourteen-year term if the author survived the original term.[41] Under the Articles of Confederation, several states adopted copyright statutes that similarly extended protection to existing works. For example, Madison introduced legislation in the Virginia House of Delegates in 1785 that granted authors copyrights of twenty-one years in books or pamphlets "already printed."[42] Massachusetts, New Hampshire, Rhode Island, and South

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[39] 3 STORY, *supra*, § 1874.

[40] *Id.* § 1878.

[41] 8 Anne, ch. 19 (1710) (Eng.).

[42] Act of Nov. 16, 1785, *reprinted in* 8 PAPERS OF JAMES MADISON 418-19 (William T. Hutchinson et al. eds. 1967).

Carolina also extended copyrights to existing published works.[43]

In 1790, Congress adopted the first copyright statute under the new Constitution. Like the Statute of Anne, the Act of 1790 was styled "An Act for the encouragement of learning . . . ." The Act granted a copyright of fourteen years for new works, and fourteen years from the date of recording for "any map, chart, book or books already printed within these United States" to the author or to the author's "executors, administrators or assigns."[44] By choosing the Statute of Anne's retroactive form over some state regimes that protected new works only, Congress made especially clear its endorsement of extending copyrights to existing works. The First Congress's interpretation of its Copyright Clause authority is entitled to "very great weight."[45]

Congress repeatedly extended intellectual property rights retroactively over the following two centuries. In 1808, for example, Congress extended the patent of Oliver Evans by fourteen years when Evans was deprived of much of the enjoyment of his patent rights due to an administrative error.[46] In 1828, Congress extended a copyright belonging to James Rowlett.[47] In 1831, Congress passed a new copyright statute,

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[43] *See* BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 108-24 (1967). Connecticut, New Jersey, Maryland, Pennsylvania, North Carolina, Georgia, and New York did not extend copyrights to newly published works.

[44] Copyright Act of 1790, 1 Stat. 124 (1790).

[45] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

[46] *See* An Act for the Relief of Oliver Evans, 6 Stat. 70-71 (Jan. 21, 1808); *see also Bloomer v. McQuewan*, 55 U.S. 539, 543 (1852) (listing additional patent extensions).

[47] 6 Stat. 389-90 (May 24, 1828). One *amici* brief argues that Rowlett's copyright claim was based on the invalid "sweat-of-the-brow" theory rejected in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 390 (1991). *See* Br. *Amici Curiae* of Tyler T. Ochoa, et al. [hereafter "Ochoa Br."], at 24. The issue, however, is not the validity of Rowlett's copyright, but the confidence of members of Congress at that early date that they had authority to extend the copyrights of already published works.

requiring recordation of copyrights, and lengthening the initial terms of new and existing copyrights to twenty-eight years.[48] The Copyright Act of 1909 likewise extended the copyright renewal term to twenty-eight years for new and existing works,[49] followed by the Copyright Act of 1976, which extended the term for new and existing works by various formulae intended to approximate the new standard term of life of the author plus fifty years.

Petitioners and their *amici* contest the force of these precedents; they argue, in essence, that the Act of 1790 was *too early* to constitute a retroactive extension, but that all of the subsequent legislation occurred *too late* to reflect the Constitution's original meaning. But neither end of that vise-grip argument has force. The 1790 extension of rights in existing works demolishes Petitioners' argument notwithstanding that those prior works were copyrighted under state law, and the subsequent extensions cannot be dismissed as too late to count when they are part of an impressive, unbroken chain: virtually every significant piece of copyright legislation adopted in Britain and the United States between 1700 and 1996 extended additional copyright protection to previously published works.

C. The Framers' Suspicion of Monopolies Is Irrelevant To The Issues Before This Court.

Lacking direct historical support for their claims, Petitioners analogize the CTEA's supporters to the corrupt British ministers who vexed the Framers and the London booksellers despised by Milton.[50] But Petitioners misrepresent both the real object of the Framers' concern and the extent to which the Framers shared it.

The argument that the Framers so abhorred monopoly powers – which Petitioners implicitly define as any grant of

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48 Copyright Act of 1831, 4 Stat. 436 (1831).

49 Copyright Act of 1909, 35 Stat. 1075 (1909).

50 *See* Pet'r Br. at 27 nn. 10 & 11; Ochoa Br. at 29-30.

exclusive rights, including copyrights and patents[51] – that they came close to banning all monopolies relies almost exclusively on a selection of quotations from Thomas Jefferson, unsurprisingly, for among the Framers, Jefferson had some of the most alarmist views about monopolies.[52] And Jefferson did indeed propose a constitutional amendment that would have prohibited the granting of any government monopoly, and inserted in the Constitution a specific term for patents and copyrights.[53]

Petitioners' reliance on the "monopoly" issue, however, is misplaced. When they spoke of "monopolies," the Framers did not mean what we would mean by the term today; rather, they referred to the reviled practice by which the British Crown granted numerous favors to wealthy individuals.[54]

This arbitrary, corrupt system extended to the granting of patents and the licensing of books. Exclusive rights were granted to businesses, and laws such as the Licensing Act of Charles II were passed to invest selected publishing companies with the power to control the press to the Crown's benefit.[55]

But the problem was not limited to or focused on intellectual property. Favorites of the Crown were given colonial governorships, judicial office, and lucrative business opportunities of all kinds. "These corporate privileges were not frequently granted or widely available; they were made at the initiative of the government, not private interests." Indeed,

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51 *See* Pet'r Br. at 25-26.

52 *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 320 (1991) (contrasting Jefferson's belief that corporate grants should be limited with the actual practice of state legislatures).

53 Letter from Jefferson to Madison, Aug. 28, 1789, *available at* http://memory.loc.gov/ammem/mtjhtml/mtjhome.html.

54 *See* WOOD, *supra*, at 82, 318-19.

55 EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 54-56 (Boston, Little, Brown & Co., 1879). "The declared purpose of the Stationers' Company," for example, "was to prevent the propagation of the Protestant Reformation." *Id.* at 55-56.

the South Sea Bubble, whose collapse in 1720 precipitated a severe economic crisis in England, with fortunes ruined and revelations of widespread corruption among the directors and their cronies at Westminster, resulted from such politically bestowed monopolies.[56]

By the time of the Revolution, many in both England and America came to regard such practices as hopelessly corrupt. Beginning in the early seventeenth century, Parliament began taking action against some of the more egregious abuses. For example, in 1624 Parliament passed the Statute of Monopolies, which abolished several forms of monopoly, and limited patents to twenty-one years for existing patents and fourteen years for new ones. The Statute of Anne, by vesting initial copyright in authors and limiting the terms, was in some ways a response to earlier laws such as the Licensing Act.

The Framers were part of this reform effort. Drawing on the lessons of the South Sea Bubble and other instances of British "corruption", they believed strongly that the government should not be allowed to bestow special favors to a few that were not available to all. It was for this reason that Elbridge Gerry and George Mason refused to sign the Constitution, and four states during the ratification debates sought restrictions prohibiting the granting of "exclusive advantages of commerce."[57]

But the "monopolies" Gerry and Mason opposed were discretionary grants of authority to powerful individuals, not all forms of exclusive rights. And even so, many Framers understood such "monopolies" to be essential, in the absence of a powerful central government, to building internal improvements, creating banks, and undertaking other

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[56] *See* WOOD, *supra*, at 319. On the South Sea Bubble crisis, see generally BRAY HAMMOND, BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR (1957).

[57] Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 91 (quoting 6 THE AMERICAN MUSEUM 303 (1789)); *see also* Ochoa Br. at 19.

necessary enterprises.[58] Thus, Congress did not adopt Jefferson's proposal to prohibit all monopolies except patents and copyrights.[59] Madison, Benjamin Franklin and James Wilson all proposed adding a provision to Article I, Section 8, granting Congress the authority "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," so that Congress might build canals, universities or other improvements.

The Framers were even less concerned about "monopolies" over books and inventions. As Hamilton observed in his Report on Manufactures, "[t]he propriety of stimulating by rewards, the invention and introduction of useful improvements, is admitted without difficulty."[60] Madison noted in the *Federalist No. 43*, that the "utility" of the Copyright "power will scarcely be questioned." The relative lack of controversy over the granting of "monopolies" to reward authors and inventors was no doubt due to the belief, widely shared by the Framers, that "[w]hile a monopoly was conceived as consisting 'in restraining the common right,' there was no unjust encroachment in the case of invention since nothing had existed previously."[61]

It is thus correct, as Petitioners and *amici* have argued, that the Framers were deeply concerned with "monopolies," but incorrect that this concern supports their challenge. The Framers' primary concern with respect to copyrights, as with all monopolies, was that they be available to all and not abused for partisan ends. Even Ochoa, Rose, and Walter-

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[58] *See generally, e.g.*, OSCAR HANDLIN & MARY FLUG, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1969); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1880 (1948).

[59] *See* Letter from Jefferson to Madison, Aug. 28, 1789, *supra*.

[60] Alexander Hamilton, *Report on Manufactures*, *in* 10 PAPERS OF ALEXANDER HAMILTON 338-40 (Harold C. Styrett et al. eds. 1961).

[61] CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800, at 183 (1988).

scheid admit as much: the Copyright Clause, in their view, "appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies one hundred and fifty years earlier."[62] Petitioners have therefore placed the emphasis on the wrong word in the Copyright Clause. The Framers did not intend to require courts to hold copyright legislation to a specific standard of "progress;" rather, they intended to limit the purposes for which copyright legislation might be passed to the promotion of "the Useful Arts," as opposed to the promotion of political patronage, or of the President's religious views.[63] Given that copyrights are available to all authors, and that the benefits of the CTEA apply equally to all copyrights, the Framers' concerns with discretionary "monopolies" are simply not implicated by the CTEA.

D. The Framers Intended To Vest Congress With The Authority To Determine The Proper Term For Copyrights.

The Framers gave Congress discretion to adapt to changed circumstances by setting the boundaries of copyright, including its term. Had they intended otherwise, they would have adopted Jefferson's suggestion of limiting copyrights to a constitutionally specified term. Since they did not, this Court was correct in demarcating the proper term for copyrights and patents as "subject to the discretion of Congress."[64]

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62 Ochoa Br. at 17.

63 *See Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

64 *Pennock & Sellers*, 27 U.S. at 16-17.

III. Regarding Existing Works, Petitioners' Arguments Would Require Invalidation Of Not Only The CTEA But Also Any Prior Term Extensions And Other Expansions Of Copyright, And Substantial Reliance Interests Warrant Rejection Of Petitioners' Arguments

A. Petitioners' Theory Implicates Not Only The CTEA But Also Prior Copyright Extensions And Changes.

Petitioners argue that the "retroactive" extension of the term of pre-existing works violates the "Limited Times" requirement of the Copyright Clause. To begin with, the CTEA is not "retroactive" because it retrieves no works already in the public domain, but rather, merely "disappoints the expectation that the work was going to go into the public domain at the end of 1998, as opposed to twenty years thereafter."[65] But, if the public has a vested interest of a constitutional dimension in a work falling into the public domain on an expected date, "then it follows that every term extension after 1790 is constitutionally infirm."[66] Indeed, if one accepts Petitioners' logic, "[p]erhaps the public had a vested interest in the public domain being whatever the subject matter and scope of copyright was at the time that each of those works was created. That would mean, for example, that any sound recording created before enactment of the Digital Performance Right in Sound Recordings Act of 1995 should not enjoy such a performance right today."[67] And it would mean, for example, that Congress' decision to include photographs in the definition of copyrightable subject

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65 Ginsburg, *supra*, at 702.

66 *Id.* at 703.

67 *Id.* at 704.

matter was unconstitutional, and that *Burrows-Giles Lithograph* was wrongly decided.[68]

Conceding, as they must, that "a rule against retroactive copyright extensions would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act," Petitioners proffer a basis to distinguish the CTEA from prior extensions: the CTEA extension is automatic, they say, while the 1831 and 1909 extensions were contingent on registration, renewal, or the like. Pet'r Br. 30 n.13. Petitioners do not explain why the presence or absence of these *pro forma* requirements bears any relevance to the constitutionality of retroactive copyright extensions, and the 1976 extension, which Petitioners conspicuously fail to mention in their footnote, was automatic. Petitioners entirely fail to demonstrate how the CTEA or prior extensions "can be distinguished from the CTEA," *id.*, and in considering their arguments the Court must consider the extent to which those arguments would upset a huge range of existing rights resting on prior durational and other changes in copyright law.

B. Substantial Reliance Interests Warrant Rejection Of Petitioners' Arguments.

For twenty-five years, artists and executives in the music, film, print, and other industries have done business on the understanding that the rights Congress granted them in 1976, and before and after as well, were settled and secure. Reliance on those rights undergirded innumerable transactions concerning tens of thousands of works and hundreds of millions of dollars. As Professor Arthur Miller notes:

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[68] *See also* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 137, 172-173 (Winter 1993) (footnotes omitted) ("When Congress...expanded the scope of copyright to include the right of public display (presumably applying to existing works as well), or of public performance or musical works whether or not for profit, or added the cable compulsory license, or added certain moral rights for visual artists in 1990, [it] affected existing as well as future works....").

> We have enormous industries that invest millions of dollars into works of expression – from books to phonograph records, television shows, motion pictures and Internet systems. That is the way we disseminate copyrighted works, and thank goodness – because that enables us to disseminate not simply on Fifth Avenue and Forty-Second Street, but to the four corners of the globe through the Internet. That takes money. It takes capital. You must attract capital into the copyright industries or you will not achieve the purposes of the Copyright Clause. You attract capital by making sure those industries have a rate of return. It is not simply Hawthorne sitting at his desk with a quill. We have to provide incentives for a whole raft of people and industries to invest capital in order to promote the progress of science and the useful arts.... We must incentivize the dissemination industries, the preservation industries, and the derivative work industries.[69]

Petitioners' theory would unsettle, for tens of thousands of copyright owners, rights established by the 1976 Act and the extensions leading up to it. Countless transactions would risk being undone, and countless investment-backed expectations denied.

The Court's recent warning that "courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community" applies with equal force to the community of copyright holders: where the law in an area is "settled," "fundamental alterations in these rules risk

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[69] Ginsburg, *supra*, at 692-93.

destroying the legitimate expectations of . . . countless" creators and investors "in their property."[70]

Indeed, *Festo's* warning is even more compelling here. Though the "doctrine of equivalents" at issue in *Festo* had been occasionally reaffirmed, those reaffirmances were part of a continuing "debate,"[71] marked by vociferous dissents, hesitant decisions acknowledging unfortunate uncertainty, and repeated adjustments of the doctrine by Congress and the courts.[72] Copyright term extensions for pre-existing works date back even further, and the history of those extensions is remarkably free of debate and dissent. As Petitioners note, no court, and evidently no prior litigant, has ever challenged the constitutionality of such extensions.[73] Indeed, Petitioners' observation that "the 1909 and 1976 statutes simply followed the examples that preceded them"[74] is precisely on point: Congress evidently treated the constitutionality of copyright term extensions for pre-existing works as "settled" in 1909, from 1961 to 1976, and again in 1998. Given Congress's settled view, its repeated legislation based on that view, and the fact that no court has ever before doubted the constitutionality of that practice, *Festo's* instruction that "[t]here is no justification for applying a new [rule] to those who relied on a prior doctrine"[75] applies powerfully here.

This Court has repeatedly stressed the importance of not lightly disrupting settled expectations. In *Landgraf v. USI Film Products*,[76] for example, this Court emphasized that

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[70] *Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, __ U.S. __, 122 S. Ct. 1831, 1841 (2002), *citing Warner-Jenkinson v. Hilton Davis Chem. Co.*, 520 U.S. 17, 20, 28 (1997) (reaffirming the doctrine of equivalents in light of its "lengthy history").

[71] *Id.* at 20.

[72] *See generally Festo, supra.*

[73] Pet'r Br. at 30. *See also Eldred v. Reno*, 239 F.3d 372, 372 (D.C. Cir. 2001) (observing that no appellate court had ever before addressed the constitutionality of extensions as applied to existing works).

[74] *Id.*

[75] *Festo*, 122 S. Ct. at 1841.

[76] 511 U.S. 244, 270 (1994).

reliance interests deserve particular deference when contractual or property rights are at issue, "matters in which predictability and stability are of prime importance."[77] "In a free dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[78]

C. There Has Been A Great Deal Of Actual Reliance On The 1976 Copyright Extension And Other Non-durational Extensions.

In 1976, Congress extended the duration of all existing copyrights,[79] as the culmination of a series of interim extensions started in 1962.[80] Like previous retroactive copyright extensions, the scope of those extensions was substantial; they affected the copyright terms of almost every

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[77] *Id.* at 256. *See also Nordlinger v. Hahn*, 505 U.S. 1, 14 (1992); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[78] *Landgraf*, 511 U.S. at 266. *See also, e.g., Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) (refusing to make ruling retroactive because "the business has...been left for thirty years to develop, on the understanding that it was not subject to existing...legislation"), see also *Radovich v. National Football League*, 352 U.S. 445, 450-51 (1957) (same).

[79] Copyright duration was 56 years under the 1909 Act, composed of a 28-year first term, renewable for a further 28 years. For most existing works, the 1976 Act left the first term at 28 years but extended the second term from 28 to 47 years, bringing the total term of protection to 75 years. Copyrights already in their second term received the additional 19 years automatically; copyrights in their first term received the full 47 year second term upon renewal. 1976 Act, § 304 (a), (b). *See* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 318 *et seq.* (4th ed. 1993). Unless otherwise noted, this discussion assumes that copyright holders renewed their copyrights at the end of the first 28-year term, and were thus entitled to the full 75 years of protection granted by the 1909 and 1976 Acts.

[80] *See* Pet'r Br. at 2 n.1 (collecting extensions).

work copyrighted in the United States between 1910[81] and 1976, provided that the copyright had been renewed. The result was lengthened copyright protection for more than a half-century of creative activity.

The Congressional Research Service ("CRS") estimates that, in the twenty-year period between 1922 and 1941, copyrights were registered to no less than 77,000 works – or 3,850 works *per year*, on average – that continue to earn royalties for their full seventy-five-year term.[82] Extrapolating from this twenty-year period to the full sixty-six year period at issue here, the number of works significantly affected by the 1976 extension is in the range of 250,000.[83] These 250,000 works, like any other piece of property or any other investment, produce income and the rights in many of them have been bought, sold, and traded, used as collateral, and otherwise relied upon, by creators and industry, in the quarter century since passage of the 1976 Act.

Dollar amounts are similarly reflective of the huge reliance interests at stake. CRS estimates that approximately 49,000 books, musical works, and movies were copyrighted between 1922 and 1941 that were still earning royalties at the end of their copyright term; CRS further estimates that the additional nineteen years of royalties that Congress granted to these works in 1976 was worth approximately

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[81] Works created before 1910 were subject to the term set by the 1831 Copyright Act which granted 42 years of protection, and their copyrights had all expired by 1951—well before the first interim extension in 1962.

[82] Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values, in* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, at 8, 12, 15, 16 (May 11, 1998).

[83] Again, this number takes into account that only a small number of works are renewed, and an even smaller number have enduring value to their creators in the form of royalties for decades following their publication. (Without accounting for these things, the numbers would be far larger: there were approximately 167,000 first-time copyright registrations a year, on average, between 1923 and 1941; for the full 65-year period, the equivalent number would be on the order of ten million.)

$317,000,000.[84] Again extrapolating from the twenty-year period to the sixty-six year period at issue here, the additional royalties on books, music, and movies that Congress granted in the 1976 Act is on the order of one billion dollars.

Works affected by the 1976 extension include some of the 20th century's greatest creative and artistic achievements. Even limiting the inquiry to copyrights that are set to expire by 2010 under the 1976 Act – copyrights, that is, in which the Act's nineteen-year extension has already lapsed or will do so shortly – Petitioners' theory would unsettle the ownership status of books like Faulkner's *The Sound and The Fury* (1929), Fitzgerald's *The Great Gatsby* (1925) and Hemingway's *A Farewell to Arms*; musical works like Copland's *Appalachian Spring* (1944), Gershwin's *Rhapsody in Blue* (1924) and *Porgy and Bess* (1935), and Duke Ellington's *Take the 'A' Train* (1938); and movies and musical theater works like *Oklahoma* (1943), *The Wizard of Oz* (1939), *Gone with the Wind* (1939), and *Casablanca* (1942).[85] *See* Appendix, *infra* for examples of other works.

Transactions executed in at least partial reliance on the 1976 Act have been large and numerous. To give just a few examples, Turner Broadcasting System acquired Metro-Goldwyn-Mayer ("MGM") for $1.5 billion in 1985 with the primary purpose of acquiring MGM's film library.[86] In 1999,

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[84] Rappaport, *supra*, at 16 (all amounts in 1997 dollars).

[85] By virtue of the 1976 Copyright Act and the CTEA, each of these works is still under copyright protection. Royalties on many of these works is substantial: The Rodgers and Hammerstein Organization earns $10 million annually in royalties and licensing fees; a nationwide license for a Gershwin song, worth between $45,000 and $75,000 fifteen years ago, now earns more than $250,000; Rhapsody in Blue became United Airlines' theme song for an estimated $500,000. David D. Kirkpatrick, *Media; Publishers and Libraries Square Off Over Free Online Access to Books*, N.Y. TIMES, June 17, 2002, at C7.

[86] Geraldine Fabrikant, *Turner To Sell MGM Assets*, N.Y. TIMES, June 7, 1986, at A35. ("after [$300 million in] asset sales, Mr. Turner will have paid about $1.2 billion for the property he sought in the MGM purchase, the studio's film library.")

EMI Records acquired the Windswept Pacific music catalog, which included more than 40,000 titles from early rock and roll to modern pop songs, for 126 million pounds (approximately $200 million).[87] And during the last decade, Viacom acquired Simon & Schuster and Bertlesmann acquired Random House.

Copyrights, of course, are bought and sold every day, and these large transactions are just a small subset. Petitioners' theory would throw countless transactions, large and small, into doubt, potentially rendering vast numbers of copyrights and copyright-driven transactions uncertain and insecure.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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[87] *EMI Pays Pounds 11.5m for Stake in Phil Collins Music Publisher*, THE INDEPENDENT, November 4, 1999, at 23.

APPENDIX

Selected Copywritten Works
1910-1954

Books

Edith Wharton	Ethan Frome	1911
Robert Frost	Poetry from A Boy's Will - through - The Road Not Taken	1913 1951
Agatha Christie	The Mysterious Affair at Styles	1920
Willa Cather	One of Ours	1921
T. S. Elliot	The Waste Land	1922
P.G. Wodehouse	The Inimitable Jeeves	1923
Sherwood Anderson	Horses and Men	1923
F. Scott Fitzgerald	The Great Gatsby	1925
Langston Hughes	Poetry from The Weary Blues - through - Montage of a Dream Deferred	1926 1951
Sinclair Lewis	Arrowsmith	1926
Virginia Wolf	To the Lighthouse	1927
William Faulkner	The Sound and the Fury As I Lay Dying	1929 1930
Thomas Wolfe	Look Homeward, Angel - through - A Western Journey	1929 1951
Pearl S. Buck	The Good Earth	1931
Aldous Huxley	Brave New World	1932
James Hilton	Lost Horizon	1933
Margaret Mitchell	Gone with the Wind	1936
J. R. R. Tolkein	The Hobbit	1937

Thornton Wilder	Our Town	1938
John Steinbeck	The Grapes of Wrath	1939
Eugene O'Neill	The Iceman Cometh Long Day's Journey Into Night	1939 1941
Ernest Hemingway	The Sun Also Rises A Farewell To Arms For Whom the Bell Tolls	1926 1929 1940
Eudora Welty	A Curtain of Green	1941
Tennessee Williams	The Glass Menagerie A Streetcar Named Desire	1945 1947
W.H. Auden	The Age of Anxiety	1947
Norman Mailer	The Naked and the Dead	1948
George Orwell	Nineteen Eighty-four	1949
Arthur Miller	Death of a Salesman The Crucible	1949 1953
Ray Bradbury	Fahrenheit 451	1953
Herman Wouk	The Caine Mutiny	1954

Music

W.C. Handy	St. Louis Blues	1914
George Gershwin	Rhapsody in Blue An American in Paris Porgy & Bess	1924 1928 1935
"Jelly Roll" Morton	Smokehouse Blues	1926
Jerome Kern	Showboat	1927
Igor Stravinsky	Symphony of Psalms	1929
Edward "Duke" Ellington	It Don't Mean a Thing if it Ain't Got that Swing Mood Indigo	1932 1933
Cole Porter	Anything Goes	1934
Irving Berlin	Cheek to Cheek	1935

Harry Warren	Lullaby of Broadway Chattanooga Choo Choo You'll Never Know That's Amore	1935 1941 1943 1953
Jerome Kern	The Way You Look Tonight	1936
Lorenz Hart	My Funny Valentine	1937
Samuel Barber	Adagio for Strings	1938
Aaron Copland	Billy the Kid Appalachian Spring	1938 1944
Duke Ellington	Take the 'A' Train	1938
Ella Fitzgerald and Al Feldman	A-Tisket A-Tasket	1938
Harold Arlen	Over the Rainbow Blues in the Night White Christmas	1939 1942 1942
Leigh Harline	When You Wish Upon A Star	1940
Rodgers & Hammerstein	Oklahoma! Carousel South Pacific The King and I	1943 1945 1949 1951
Woody Guthrie	This Land is Your Land	1944
Consuelo Velazquez	Besame Mucho	1944
Charlie Parker	Groovin' High	1945
Irving Berlin	Annie Get Your Gun	1946
William "Count" Basie	Stay Cool	1946
"Dizzy" Gillespie	A Night In Tunisia	1946
Jule Styne	Let It Snow, Let It Snow, Let It Snow	1946
William Best	For Sentimental Reasons	1946
Johnny Marks	Rudolph the Red Nosed Reindeer	1949
Frank Loesser	Guys & Dolls	1950
Jack Rollins	Frosty the Snowman	1950

Art Tatum	Stompin at the Savoy	1953
Bob Merrill	How Much Is That Doggie In Window	1953
Pat Ballard	Mister Sandman	1954
Bill Haley	Rock Around the Clock	1954

Movies

Ben-Hur	1926
The Jazz Singer	1927
Duck Soup	1933
King Kong	1933
It Happened One Night	1934
Snow White and the Seven Dwarfs	1937
Gone With the Wind	1939
The Wizard of Oz	1939
Fantasia	1940
Citizen Kane	1941
The Maltese Falcon	1941
Casablanca	1942
Double Indemnity	1944
It's a Wonderful Life	1946
Singin' in the Rain	1952
On the Waterfront	1954

AMICI CURIAE

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Glen Roven is a composer.

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